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No. 431

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1970

LOUIS P. KURFESS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Louis P. Kurfess, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported, but is printed in the Appendix to this Petition (Appendix A). (Appendix B is the order of the Court of Appeals denying rehearing.)

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1970 (Appendix A). Petition for Rehearing was denied by order on June 25, 1970 (Appendix B).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Was the defendant denied a fair trial and due process where the Trial Court refused to hold a hearing outside the presence of the jury as to the voluntariness and admissibility of the defendant's alleged out-of-court statements although repeatedly moved to do so by defendant's counsel?

2. Were statements of the defendant unconstitutionally obtained and admitted into evidence where the government failed to offer any proof that the defendant affirmatively waived his rights to counsel and to remain silent as required by the standards of the Supreme Court in *Miranda* v. *Arizona*?

3. Did the trial court coerce the defense into improperly stipulating to the defendant's reputation, thereby denying him his Sixth Amendment right to present a defense, and did the trial court thereafter improperly instruct the jury as to the defendant's reputation and the weight of his testimony?

4. Are a defendant's Fourth Amendment rights violated by a second warrantless search by customs agents, where he has already once undergone a search by a customs agent, been charged a duty, and told he could go?

5. Was the defendant denied his Sixth Amendment right to effective assistance of counsel even though he had

retained counsel, when the record shows his attorney was unprepared on the law, failed to make timely pretrial motions, failed to have witnesses available for the defense, failed to tender jury instructions, and failed to raise substantial defenses?

6. Is there a fatal variance between the proof and the charge in the indictment where the indictment charges the defendant with smuggling and clandestinely introducing merchandise into the United States, and where the evidence offered by the government showed that the acts of the defendant were in no way "clandestine", but were part of a submission of the defendant's goods for customs inspection and duty assessment?

7. Did the government fail to meet the constitutional burden of proving the essential elements of knowledge and intent where the indictment charges the defendant with ". . . wilfully and knowingly, and *with intent to defraud the United States of America*, . . .", when no evidence was offered as to whether the items alleged to have been brought into the country by the defendant were dutiable and thus there was no proof to show the United States would suffer any loss and would be "defrauded"?

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Amendment IV, Constitution of the United States

"AMENDMENT IV—SEARCHES AND SEIZURES

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V. Constitution of the United States

"AMENDMENT V—CAPITAL CRIMES: DOUBLE JEOPARDY: SELF-INCRIMINATION: DUE PROCESS: JUST COMPENSATION FOR PROPERTY

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI, Constitution of the United States

"AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Title 18, United States Code

"§542. Entry of goods by means of false statements

Whoever enters or introduces, or attempts to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, writ-

ten or verbal, or by means of any false or fraudulent practice or appliance, or makes any false statement in any declaration without reasonable cause to believe the truth of such statement, or procures the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, whether or not the United States shall or may be deprived of any lawful duties; or

Whoever is guilty of any willful act or omission whereby the United States shall or may be deprived of any lawful duties accruing upon merchandise embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission—

Shall be fined for each offense not more than $5,000 or imprisoned not more than two years, or both.

Nothing in this section shall be construed to relieve imported merchandise from forfeiture under other provisions of law.

The term 'commerce of the United States', as used in this section, shall not include commerce with the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam."

Title 18, United States Code

§545. Smuggling goods into the United States

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise con-

trary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

"The term 'United States', as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam."

Title 18, United States Code

"§3481. Competency of accused

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

Federal Rules of Criminal Procedure

"Rule 16. Discovery and Inspection

(a) *Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony.* Upon motion of a defendant the court may order the

attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) *Other Books, Papers, Documents, Tangible Objects or Places.* Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the government agents in connection with the investigation or prosecution of the case, or of statements made by the government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. §3500.

(c) *Discovery by the Government.* If the court grants relief sought by the defendant under subdivision (a) (2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government

to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case, and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(d) *Time, Place and Manner of Discovery and Inspection.* An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(e) *Protective Orders.* Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court *in camera.* If the court enters an order granting relief following a showing *in camera,* the entire text of the government's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the defendant.

(f) *Time of Motions.* A motion under this rule may be made only within 10 days after arraignment or at such reasonable later time as the court may permit. The motion shall include all relief sought under

this rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(g) *Continuing Duty to Disclose; Failure to Comply.* If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances."

STATEMENT OF THE CASE

NATURE OF THE CASE AND ITS DISPOSITION

Louis P. Kurfess was indicted in a one-count indictment returned on July 23, 1968, charging that Kurfess "wilfully and knowingly, and with intent to defraud the United States of America, did smuggle and clandestinely introduce into the United States at the Port of Chicago, merchandise, that is, four cartons containing clothing, jewelry, and other items, which should have been invoiced; in violation of Title 18, United States Code, Section 545." (R. 2, A. 6)

On September 30, 1968, Louis P. Kurfess was arraigned before the Hon. Bernard M. Decker, entered a plea of not guilty, and was given 10 days to file motions, and the cause was continued on October 18, 1968 to November 8, 1968 (R. 10, A. 6-7).

On November 8, 1968, Louis Kurfess appeared with his attorney and moved for leave to file certain pre-trial motions including a motion to suppress, a motion under Rule 16, F.R.Cr.P., and other pre-trial motions, no motions having previously been filed, and the government having been served on November 1, 1968. (Tr. 2-6, A. 59-61).

Leave to file the motions was denied except for the motion to suppress on which motion the government withdrew its objection to filing and requested a hearing (R. 12, A. 8).

The cause was continued from time to time, and a hearing was had on the motion to suppress on January 7, 1969, at which time said motion was denied (R. 18, A. 9).

On January 21, 1969, the cause was tried before a jury and motions for acquittal at the close of the government's case and at the close of all evidence, were denied. A sealed verdict was returned on January 22, 1969, finding Louis P. Kurfess guilty as charged in the indictment (R. 24, 25, A. 9).

Louis P. Kurfess filed post-trial motions for a new trial or in arrest of judgment, which were denied on March 4, 1969. He was then sentenced to two (2) years imprisonment subject to Section 4208(a)(2), of Title 18, U.S.C. and ordered to pay a fine of $5,000.00 (R. 28, 29, A. 11).

TRANSCRIPT OF PROCEEDINGS

Proceedings of November 8, 1968

The Court, on September 30, 1968, at Kurfess' arraignment, had given him 10 days to file pre-trial motions (R. 7, A. 6).

On November 1, 1968, Kurfess' lawyer served various pre-trial motions on the government, and on November 8,

1968, moved the Court for leave to file the motions (Tr. 2-3; A. 59-60). The motions included a motion for grand jury minutes, bill of particulars, exculpatory evidence, and a motion to suppress; as well as a motion for discovery under Rule 16 of the Federal Rules of Criminal Procedure.

The Government objected to the filing of the motions as being untimely except for the motion to suppress. Kurfess' lawyer stated that it was his office's negligence that resulted in the motions being late (Tr. 3, A. 60). The Court denied leave to file all motions except the motion to suppress, which was set for hearing (Tr. 5, A. 61).

Motion To Suppress

LOUIS P. KURFESS testified that on June 29, 1968, he and his wife returned to Chicago from Germany, arriving at the O'Hare Airport (Tr. 3, A. 12). He took his baggage to the customs counter. The agent went through two of his bags and his briefcase, looked at Kurfess' declaration and assessed a duty of $1.03. The agent then told him that was all and he could close his bags (Tr. 4-7, A. 12-13).

Kurfess started delivering his bags to a sky cap when two other agents approached him and told him to bring his bags and go to a private room (Tr. 7-8, A. 13). Kurfess was told to take everything out of his pockets and all of his bags were searched for a second time (Tr. 11, A. 14).

The government argued that the motion to suppress should be denied as it was a border search, which is legal. Kurfess' lawyer stated that he was not prepared to argue the law, but argued that second searches without a warrant are illegal (Tr. 20-22, A. 17-18).

The Court denied the motion to suppress (Tr. 22, A. 18).

The Trial

The cause was called for trial on January 21, 1969, and a jury was selected. After an opening statement on behalf of the Government and the waiver of an opening statement on behalf of the defense (Tr. 2-6, A. 18), the Government called TERRENCE SCHUESSLER to the stand, who testified that on June 29, 1968, he was a summer employee of the Customs Bureau working as a Customs Inspector at O'Hare Airport (Tr. 7, A. 18).

He testified that between 2:30 and 4:30 P.M. that day, he inspected Mr. Kurfess' baggage. He stated Kurfess had seven articles, and that he opened 2 suitcases and a briefcase and a box (Tr. 7-11, A. 18-19).

He stated that Government's Exhibit 2 which was the box he examined, contained watches which he stated Kurfess said he had acquired in the United States, taken to Germany, and were now being returned (Tr. 13, A. 20-21). He stated that he inspected the baggage and asked Kurfess if he had declared everything, and that Kurfess said he had (Tr. 15, A. 21). Schuessler then charged Kurfess a duty and testified that he then summoned the Customs Port Investigator for a more thorough search (Tr. 15, A. 22).

The Government moved to introduce Exhibits 1, 2 and 3 into evidence. Kurfess' lawyer objected but stated he was unfamiliar with the Exhibits and had no questions of the witness concerning them (Tr. 17, A. 22-23). The Exhibits were admitted.

On Cross-Examination, SCHUESSLER stated he charged Kurfess a duty of $1.14. He stated that he did

not call over the Post Investigator until he had completed his duties and charged Kurfess a duty (Tr. 23, A. 24). He further stated he had made a search of Kurfess' luggage (Tr. 23, A. 24).

FRANCIS SERRA, a Customs Port Investigator, was called and testified that on June 29, 1968, he was on duty and talked to Terrence Schuessler in the presence of Mr. and Mrs. Kurfess and Customs Port Investigator Strzok (Tr. 25, A. 24).

He testified that Schuessler told him Kurfess had some sealed cartons and that he (SERRA) asked Kurfess what the cartons contained, and that Kurfess said they were items taken to Europe and now being returned (Tr. 25, A. 25). SERRA said Schuessler asked him to continue the examination in the private room (Tr. 26, A. 25).

Over objection, SERRA testified that he asked Kurfess if he had declared everything and Kurfess said, yes. (Tr. 31, A. 26-27).

SERRA stated that he then opened Government's Exhibit 2 and found approximately 100 watches, and then he informed Kurfess of his Constitutional rights (Tr. 33, A. 27).

Kurfess' counsel moved to suppress any statements on the basis that no affirmative waiving of rights was testified to, which motion was denied (Tr. 33, 47, A. 28, 29).

SERRA then described his further search and the finding of numerous items including a gun (Tr. 35, A. 28). SERRA then testified to asking Kurfess about his business, and Kurfess revealed that he had a curio shop in which he sold items and which he had as a hobby (Tr. 52, A. 30).

SERRA further stated that Kurfess said he had purchased items in Government's Exhibits 2, 3 and 4 in Europe (Tr. 53, A. 30). Kurfess, when asked to sign the agent's form, did so. SERRA stated Kurfess then left, that he was not arrested.

On cross-examination, SERRA admitted he did not inform Kurfess he had a right not to sign the form (Tr. 54, A. 31).

ADAM STRZOK testified that he was also a Customs Port Investigator and was on duty on June 29, 1968, and was with Investigator Serra when Mr. Kurfess was searched. STRZOK testified substantially the same as Serra (Tr. 60-69, A. 33-36).

On cross-examination, STRZOK admitted that in his report he stated that Kurfess had stated that he (Kurfess) did not think many of the items were required to be declared as they were antiques (Tr. 77, A. 37).

The Government then rested, and the motion for judgment of acquittal was denied (Tr. 80-81, A. 38-39).

LOUIS P. KURFESS testified in his own behalf that on June 29, 1968, he and his wife were returning from Zurich, Switzerland, and landed at O'Hare Airport (Tr. 82-83, A. 39).

He further stated that he placed his bags on the conveyor in the customs area. He testified the customs agent examined his suitcases and briefcase, and that his other items were in front of the agent (Tr. 83-84, A. 39).

The customs agent told him to pay a duty, and KURFESS handed him $2.00. The agent went to another booth to get change. The inspector then told him to close up everything, he was done (Tr. 85, A. 40).

KURFESS handed the sky cap two bags, and as he was getting more, two agents intercepted him and told him to come to a separate room where he was searched for a second time (Tr. 86, A. 40). He denied committing the offense charged.

On cross-examination, KURFESS identified many of the items he had brought in. He stated that he knew they were allowed a $100 per person exemption (Tr. 91, A. 42).

KURFESS further stated he could not identify which watches he had repaired but that 50 watches had been taken with him to Europe for repairs (Tr. 92, 93, A. 42).

KURFESS further stated that he had bought about 90 watches in Europe for about $625. He stated that he personally collects most of the items in the Government Exhibits, but that he sold some of them in his curio shop (Tr. 96, A. 43).

VIOLET KURFESS testified that she is Louis P. Kurfess' wife and was with him on June 29, 1968. She further testified as to the two separate searches made by the customs agents (Tr. 100, A. 43). She stated that she did not recall her husband refusing to cooperate in any manner.

At this point, Kurfess' lawyer indicated that he had run out of witnesses; that he had approximately ten more witnesses, but that he had not anticipated the case going so fast (Tr. 104, A. 44-45).

The Court stated it would not recess, it being only five minutes to three, and that they were going to finish (Tr. 104, A. 45).

Without the defense resting, the Court permitted the Government to present rebuttal testimony (Tr. 106, A. 46).

TERRENCE SCHUESSLER testified in rebuttal that he did not tell Kurfess that he could close his bags and go (Tr. 106, A. 46).

On cross-examination, he stated he had not made any written reports, nor had he read anything to refresh his recollection but he admitted that he had discussed his testimony with the U. S. Attorney for the purpose of recollection (Tr. 108, A. 46).

The defense again related that it had additional witnesses but they were not available that afternoon (Tr. 109, A. 47).

There was then a conference on instructions, at which time Kurfess' lawyer indicated he had no instructions prepared. The Court then ruled it would give all the government instructions, except those withdrawn and no objection was made (Tr. 110-116, A. 47-48.)

Through further proceedings, the attorneys agreed to stipulate that if the persons listed by the defense were to testify, they would testify that Mr. Kurfess' "reputation is good". (Tr. 127, A. 54).

Both sides rested, and arguments were heard (Tr. 129-153, A. 56-57).

On January 22, 1969, the jury's sealed verdict was read finding Louis Kurfess guilty as charged (R. 25, 26, A. 9). On March 4, 1969, Kurfess' post-trial motions were denied and he was sentenced (Tr. 168-183, A. 59).

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals in its opinion agrees that the trial court did fail to hold a hearing outside the presence of the jury on the question of the voluntariness and admissibility of the defendant's statements." (Opinion page 3, Appendix "A").

Yet, the Court of Appeals fails to reverse the defendant's conviction. It is submitted that the holding in this case not only contravenes the holdings by other panels of the same Circuit Court of Appeals in at least two other cases (e.g., *United States* v. *Nielsen*, 7 Cir., 392 F.2d 850; *United States* v. *Kroslack*, 7 Cir. ..... F.2d. ....., No. 17759, May 15, 1970), but further, it contravenes the holding of this Court in *Jackson v. Denno*, 378 U.S. 368, 12 L.Ed. 2d 908, 84 S.Ct. 1774, which clearly and definitively held that the issues of voluntariness and admissibility of out-of-court statements must be first decided by either the Court or another jury before the jury which is to decide guilt hears the statements.

Because of the failure of the trial court to hold a hearing outside the presence of the jury, although repeatedly asked to hold such a hearing (Tr. 11, 14, 30, A. 19, 21, 26), the conviction of Louis Kurfess should be reversed.

But further, there is no showing by the government that Kurfess waived his rights to silence and to counsel as is required under the standards set forth in *Miranda* v. *Arizona*, 384 U.S. 436, 16 L.Ed.2d 694.

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused

> was offered counsel but intelligently and understandingly rejected the offer. Anything else is not waiver." *Miranda* v. *Arizona*, 384 U.S. 436, 475, 16 L.Ed. 2d 694, 86 S.Ct. 1602.

It is pointed out to the Court that when the second set of agents arrived to conduct the second search, much more than a routine border search was involved. It is suggested that at this point, the warnings should have been given, and the failure to warn makes any statements thereafter involuntary and inadmissible (see *United States* v. *De La Cruz*, 7 Cir., 420 F.2d 1093).

II.

Following completion of the Government's case and the testimony of Louis Kurfess and his wife on behalf of the defense, Kurfess' lawyer informed the Court that he had approximately ten additional witnesses who were to testify to Kurfess' "reputation" but who were not then present in court. It was further explained that since this was a jury trial, the witnesses had been told not to report until the next day since it had been his (Kurfess' lawyer's) experience that jury trials did not proceed quickly, and he had not anticipated that a trial in which the jury selection had begun at 11:00 A.M. would be completed prior to 3:00 P.M. that same day including the luncheon break (Tr. 104-106, A. 45-46).

The Court made the following comment in the presence of the jury:

> ". . . I am not going to ask in the presence of the jury why your witnesses are not here, but obviously, they should be here." (Tr. 105, A. 45)

This statement clearly was a reflection by the Court on Kurfess' lawyer's ability and preparedness and could only tend to cast Kurfess and his lawyer in a bad light with the jury.

Following this, the Court allowed the Government to present rebuttal testimony prior to the defense having rested its case (Tr. 106-108, A. 46).

In a proceeding then, outside the presence of the jury, the Court went over the instructions tendered by the government. The defense had none prepared. The Court then indicated that the case was going to be completed that day, that it would not recess to the next day to allow the defense to present its remaining witnesses (Tr. 109-119, A. 46-49). It was then approximately 3:30 P.M.

In this atmosphere of haste and coercion, Kurfess' lawyer apparently "trimmed his sails to . . . (the) judicial wind as prevailed in the courtroom during this trial" (*United States* v. *Ah Kee Eng*, 2 Cir., 241 F.2d 157, 161) and agreed to stipulate that his witnesses would testify that Kurfess' "reputation" was "good" (Tr. 123-125, A. 52-53), thereby effectively giving up Kurfess' right to present a substantial defense.

The stipulation was to a fact inadmissible and meaningless in this trial. Character and reputation evidence should be to a particular trait (29 Am.Jr. 2d §346; 13 Am. Jr. Trials, §48 pp. 539-540; Ladd, "Techniques and Theory of Character Testimony", 24 Ia.L.Rev. 498).

Further, by reason of the forced stipulation, the jury was unable to hear and see the witnesses, so as to be able to judge their credibility, and did not hear of the qualifications and positions of trust held by the witnesses in the

community, which would induce confidence in such testimony.

The total result was that Kurfess was denied his right to present a substantial defense as is guaranteed him by the Sixth Amendment to the Constitution of the United States.

The Trial Court then compounded its error by instructing the jury as follows:

> "The defendant has introduced evidence by stipulation of his good reputation in the community prior to the indictment in this case. That evidence may indicate to you that it is improbable that a person of good character would commit the crime charged.
>
> "You should consider this evidence, along with all other evidence in the case, in determining the guilt or the innocence of the defendant.
>
> "The circumstances may be such that evidence of good character alone may create a reasonable doubt of the defendant's guilt, although without it the other evidence may be more convincing. However, evidence of good reputation should not constitute an excuse for you to acquit the defendant, if, after weighing all of the evidence, including the evidence of good character, you are convinced beyond a reasonable doubt that the defendant is in fact guilty of the crime with which he is charged." (Tr. 158-159, A. 58)

Such an instruction that the jury should not use the character and reputation testimony as "an excuse to acquit" makes the testimony worthless.

The Court properly instructed the jury concerning the weight to be given to the testimony of witnesses generally, in the following words:

> "In weighing the testimony of each witness, you should consider his relationship to the Government or

to the defendant, the witness' interest, if any, in the outcome of the case, his manner while testifying, his candor, fairness and intelligence and the extent to which he has either been corroborated or contradicted by other credible evidence.

"Now, if you believe any witness, and that includes any person who has taken the witness stand, has wilfully sworn falsely to a material fact in the case, you may disregard his testimony in full or in part, except insofar as it may be corroborated by other credible evidence." (Tr. 157-158, A. 58)

Almost immediately thereafter, the Court then undertook to comment upon the fact that the defendant had taken the stand, as follows:

"Now, the defendant in this case took the stand and he is a competent witness and his testimony should not be disbelieved because he is the defendant; however, in weighing his testimony you have a right to consider the fact that he has a vital interest in the outcome of this case." (Tr. 158, A. 58)

It is respectfully urged that by singling out the defendant and his appearance and testimony on the witness stand, the Court effectively destroyed, or at least substantially impaired, the value of the defendant's attempt to defend. In *Griffin* v. *California*, 390 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106, the Supreme Court of the United States held invalid the State of California's provision that comment upon failure to testify was permissible, on the ground that it impaired a federal constitutional right. The right of a defendant to testify or not in his own behalf has a federal constitutional basis, involving due process and the right to a fair trial.

A Statute of the United States, 18 U.S.C. 3481, provides that a defendant is competent to testify at his own request, and further, based upon sound logic, this section states that a defendant's failure to request to testify shall not create any presumption against him. It is suggested that by the same token, his making of the request to testify should not create a presumption against him.

In one breath, the Judge stated that the jury should consider the relationship of the witness to the Government or to the defendant, and the witness' interest, if any, in the outcome of the case. Surely, this emphasized to the jury that the interest of a witness was to be a matter of concern in weighing his testimony.

III.

Louis Kurfess, through his counsel, moved to suppress as evidence all material seized from him by the government (R. 11, A. 7).

The evidence on the hearing showed that Kurfess had arrived at O'Hare Airport on June 29, 1968 and openly took his baggage to the customs agent for inspection. The agent inspected the baggage, physically going through many of the pieces. The agent then assessed Kurfess a duty which Kurfess paid. The agent told him he was through, "That will be all." Kurfess took his luggage and started to load it on a luggage carrier. He was then stopped by two customs agents in plain clothes and subsequently his baggage was again searched and the material offered in evidence at the trial was seized (Tr. 3-19, A. 12-17).

The government did not offer any evidence at the hearing.

The Court denied the motion to suppress (Tr. 23-25, A. 18).

It is argued that since Kurfess had undergone a "border search" and had been assessed a duty and had then been told he could go, that the second search conducted by the customs agents not being incident to an arrest nor being by warrant, and the government having failed to meet its burden of proving the legality of the search (*United States* v. *Roussel*, 278 F.Supp. 908), that the conviction of Louis Kurfess must be reversed as having been obtained by virtue of evidence seized in violation of the Fourth Amendment to the Constitution of the United States.

It is suggested that while the statutes and regulations authorize "border searches", once such a search has been conducted, and the person has cleared the customs area, he should not be subject to repeated searches by customs officials. In fact, any search made at that point must meet the requirements of the Fourth Amendment.

IV.

It is urged that the conduct of Kurfess' attorney in this case made the proceedings a farce and mockery of justice (*Cross* v. *United States*, 8 Cir., 392 F.2d 360, 366), and that Kurfess was therefore denied effective assistance of counsel as guaranteed to him under the Sixth Amendment to the Constitution of the United States. It is therefore argued that Kurfess' conviction must be reversed.

The record in this case shows that because of ". . . the negligence of my (Kurfess' lawyer's) office . . .", the pre-trial motions were filed more than a month late (Tr. 3, A. 60). Because of this, the motions were not allowed to be filed (Tr. 5, A. 61), and as a result, Kurfess was denied

the routine discovery allowed under Rule 16 of the Federal Rules of Criminal Procedure as well as having his motion for a Bill of Particulars and other matters passed upon.

At the time of the hearing on the motion to suppress evidence, Kurfess' lawyer stated: "Well, Judge, at the present time I am not prepared on the law in this matter." (Tr. 21, A. 17) The motion to suppress was denied.

It further appears that on the day of trial, Kurfess' lawyer was late and thus prejudiced the Court against Kurfess (Tr. 104, A. 44).

It further appeared during the trial that Kurfess' lawyer had never seen the evidence in the case and then did not inquire regarding the exhibits (Tr. 17, A. 22).

It also appears from the record that Kurfess' lawyer had instructed him to "call off" his witnesses who were to testify to Kurfess' good reputation and character in regards to certain traits, and that because of this, Kurfess was denied the right to present witnesses to a substantial defense (Tr. 104, 106, 109, 118-122, A. 44, 46, 47, 48-51).

Kurfess' lawyer did not tender any instructions to the Court (Tr. 110, A. 47), and did not object to any instructions tendered by the government (Tr. 110-118, A. 47-48). He also did not object to any instructions actually given by the Court.

It should further be noted that Kurfess' lawyer did not raise two substantial defenses, that is, that the actions of Kurfess were open and in no way clandestine or secretive as charged in the indictment, and that the government did not offer any proof that the merchandise concerned was dutiable as would be required.

It is argued that a careful consideration of the record in this case would lead to the conclusion that the acts of Kurfess' lawyer were merely perfunctory and not up to the standards required, and that as a result, the proceedings became a sham and mockery to the extent that Kurfess was not afforded the fair trial to which he is entitled under the Constitution.

As stated in *Glasser* v. *United States*, 315 U.S. 60, at 76, 62 S.Ct. 457 and 467, 86 L.Ed. 680:

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

It is therefore argued that because of the lack of effective assistance of counsel in this case, the conviction of Louis Kurfess must be reversed.

V.

The indictment charged that Louis P. Kurfess, "wilfully and knowingly, and with intent to defraud the United States of America, did smuggle and clandestinely introduce . . . merchandise . . .". (R. 2, A. 6).

Obviously, one of the essential elements of the offense charged in the indictment to be proved beyond a reasonable doubt by the Government would be that Kurfess did ". . . smuggle and clandestinely introduce . . . merchandise . . .".

While for the purpose of this argument, it may be conceded that Kurfess did ". . . introduce . . . merchandise . . .", it is contended that the evidence did not show that he *smuggled* or *clandestinely* introduced merchandise as would be required to prove the offense charged.

The word "clandestine" as defined in Black's Law Dictionary" (4th Edition, West Publishing Co., St. Paul, Minnesota) is "Secret; hidden; concealed". It would therefore appear that the phrase "clandestinely introduced" would indicate an introduction of merchandise in a secret, hidden, or concealed manner.

Further, the California Court of Appeals has interpreted "smuggling and clandestinely introducing" as "referring to the act of a defendant in surreptitiously and by concealment or fraud, avoiding customs and introducing goods into the United States" (*People* v. *Murgia*, 62 Cal.Reptr. 131, 135; Also see *United States* v. *Claybourn*, 180 F. Supp. 448).

Further, the United States Supreme Court has held that "smuggle" and "clandestinely introduce" means essentially the same thing and involve an element of concealment. (*Keck* v. *United States*, 172 U.S. 434, 19 S.Ct. 254, 43 L.Ed. 505.) The Fifth Circuit has held smuggling to be "the clandestine introduction of goods into the United States . . ." (*Tomplain* v. *United States*, 42 F.2d 203, 204).

The evidence adduced by the Government tended to show that Kurfess brought various articles with him from Europe which he did not invoice, but which he openly presented to a customs inspector at the Chicago port of entry at O'Hare Airport (Tr. 7-23, A. 18-24).

Kurfess' actions were in no way secret, hidden, concealed, or "clandestine".

It is argued, therefore, that the Government failed to prove the charge alleged in the indictment and that there was a fatal variance in the proof which requires reversal

(*Stirone* v. *United States*, 361 U.S. 212, 217, 218, 4 L.Ed. 2d 252, 257, 80 S.Ct. 270; *Russell* v. *United States*, 369 U.S. 749, 770-772, 8 L.Ed. 2d 240, 254-256, 82 S.Ct. 1038).

VI.

The Court should note that Section 545 of Title 18, U.S.C. (the Section under which Kurfess is charged) requires, besides proof of smuggling or clandestinely introducing merchandise, that an intent to defraud the United States must be shown, and within that element, would be a requirement that the merchandise is dutiable. And surely, where there is no actual liability for duty, the defendant cannot be found guilty of "defrauding." (see *United States* v. *Kushner*, 2 Cir., 135 F. 2d 668).

"Defraud" is defined as: "To deprive a person of property or any interest, estate, or right by fraud, deceit, or artifice" (Black's Law Dictionary, Fourth Edition). Unless the goods were dutiable and the United States entitled to receive duty, the United States would not be deprived of property, interest, estate, or right.

The Court might note that Section 542 of Title 18 U.S.C. creates an offense without regard to dutiability of the merchandise. However, Kurfess was indicted for violating Section 545, and there is no proof in this record that the items brought in the country by Kurfess were dutiable. It is therefore argued that there is a failure in proof, and that the Court should reject the "sloppy indictment" in this case, and reverse the conviction of Louis Kurfess (*United States* v. *Raysor*, 3 Cir., 294 F.2d 563, 567).

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that his Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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July 24, 1970.

APPENDIX

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1969—APRIL SESSION, 1970

No. 17563

United States of America,

Plaintiff-Appellee,

v.

Louis P. Kurfess,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 3, 1970

Before SWYGERT, *Chief Judge*, CASTLE, *Senior Circuit Judge*, and KERNER, *Circuit Judge*.

KERNER, *Circuit Judge*. Defendant Louis P. Kurfess was charged in a one-count indictment with violation of 18 U.S.C. §545. Defendant was tried before a jury, found guilty as charged, and sentenced to two years imprisonment and ordered to pay a fine of $5,000. From this decision defendant appeals. We affirm.

On June 29, 1968, defendant and his wife, returning from Zurich, Switzerland, presented seven articles of baggage and a customs declaration to the customs agent at O'Hare airport. The agent asked the defendant if he had anything to add to his declaration and the defendant responded "No." The agent opened an article of baggage which contained antique watches which were not invoiced on defendant's customs declaration. Defendant told the agent that he had bought the watches in the United States and had taken them to Germany for repair. The agent then called two other customs agents for a more thorough search. The second customs agents took defendant's baggage into a private examination room and with defendant's permission, opened all the baggage. The agents found one hundred pocket watches with foreign workings, and about seventy-five additional foreign articles. Defendant then admitted to the agents that he had acquired these items in Germany, and signed the customs declaration.

18 U.S.C. §545 provides in relevant part:

> Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced . . .
>
> Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Defendant contends that since he openly presented the boxes containing the watches and other items to the first customs agent, he could not be guilty of "clandestinely" introducing goods into the country and therefore the government failed to prove the charge alleged in the indictment. We find defendant's contention to be without

merit. We construe the phrase "clandestinely introduces" to refer to any method of introducing goods into this country surreptitiously by concealment or fraud. *See e.g. United States* v. *Claybourn*, 180 F. Supp. 448, 451 (S.D. Cal. 1960). The testimony concerning defendant's acts of carrying the foreign merchandise in four sealed cartons without listing them on his customs invoice, telling the customs agent that he had declared everything, and after the discovery of some watches, lying as to their origin, was sufficient proof to sustain the government's burden of showing "clandestine introduction."

Defendant also contends that 18 U.S.C. §545 requires an "intent to defraud the United States" evidenced by proof that the merchandise smuggled was dutiable. The defendant charges that the government failed to introduce evidence of duty and thus the proof did not satisfy the requirements of the Act. The Second Circuit faced with the same contention as raised here found in *United States* v. *McKee*, 220 F. 2d 266, 269 (2d Cir. 1955), that the 1954 amendment to 18 U.S.C. §545, which deleted the word "revenue" from "intent to defraud the revenue of the United States" indicated that the primary Congressional purpose behind the Act was not to raise revenue but to supervise and regulate the inflow of imported goods. The court concluded in light of the Act's purpose that it was no longer necessary to show that the item or items introduced clandestinely into the United States were subject to duty in order to prove a violation of the Act. We agree.

Defendant also raises as reversible error the failure of the trial court to grant his motion to suppress all material seized by the government because the second search by customs agents was violative of his fourth amend-

ment constitutional rights. Defendant argues that since he had already undergone a "border search" and had been assessed a duty and had then entered the public area, that the second search conducted by the customs agents not being incident to an arrest nor pursuant to a warrant was constitutionally impermissible. We disagree. The record indicates that the defendant had not been cleared by the first customs agent when the second customs agents arrived to continue the search. The defendant was still loading his luggage on the cart and had not passed through the double doors into the public area. The investigation of defendant's baggage was a continuing valid border search.[1]

Defendant raises as error the failure of the court to grant a *voir dire* hearing outside the presence of the jury to determine if defendant's statements made to the second customs agents previous to receiving his *Miranda* warnings were admissible. While we agree with defendant's assertion that the trial court erred in failing to hold a hearing, *cf. United States* v. *Nielsen,* 392 F. 2d 850 (7th Cir. 1965), we find the defendant's statements made to customs agents were pursuant to routine border search, before his bags were open and the foreign watches found, and therefore the *Miranda* warnings were not required. See *United States* v. *Chavez-Martinez,* 407 F. 2d 535, 538-

[1] Since we are not faced with the problem of whether there can be a second valid border search after the first search has been completed and the person has left the customs area, we need not reach this question. But see *Thomas* v. *United States,* 372 F. 2d 252, 255 (5th Cir. 1967).

39 (9th Cir. 1969).[2] Consequently, the failure to hold a *voir dire* hearing was harmless error. *Harrington* v. *California,* 395 U.S. 250 (1969).

Defendant also alléges that subsequent to receiving his *Miranda* warnings, he did not affirmatively waive his constitutional rights. We disagree. An examination of the record indicates defendant knowingly and intelligently waived his constitutional rights.

Defendant claims that a stipulation entered into by both parties, that his reputation witnesses who were not present at the close of the government's case, if present, would testify that defendant Kurfess's reputation was good, was coerced and improper. While we agree that such a stipulation is unorthodox, the record indicates that both parties were agreeable to such stipulation and we find it not to be error.

Defendant also challenges two jury instructions as error. There is no indication that defendant objected to these instructions before they were submitted to the jury and, therefore, he has waived any error. Rule 30, F. R. Crim. P. In addition, we have examined both questioned instructions and find them to be proper.

---

[2] In oral argument defendant relied on *United States* v *De La Cruz,* 420 F. 2d 1093 (7th Cir. 1970), for the proposition that defendant Kurfess' statements made previous to receiving his *Miranda* warnings were inadmissible. The facts of *De La Cruz* indicate, however, that much more than a routine border search was involved and thus we find it clearly distinguishable.

Defendant's last allegation of error is that he was denied effective assistance of counsel. We have closely examined the record and find defendant was not denied effective assistance of counsel.

For the foregoing reasons, we affirm.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Thursday, June 25, 1970

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*

Hon. LATHAM CASTLE, *Sr., Circuit Judge.*

Hon. OTTO KERNER, *Circuit Judge*

No. 17563

United States Of America,

Plaintiff-Appellee,

vs.

Louis K. Kurfess,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for rehearing filed in this appeal be and the same is hereby denied.